IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04/08/2003

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

C.A.No.392 of 1999 and C.A.No. 802 of 1999

C.A.No.392 of 1999:

Shanmugam .. Appellant

-Vs-

State by
Intelligence Officer
Narcotic Control Bureau
South Zone
Chennai .. Respondent

C.A.No.802 of 1999:

Intelligence Officer
Narcotic Control Bureau
South Zone
Chennai .. Appellant

vs

1. P.Raja Singh
2. B.K.Asokan
3. K.Anand .. Respondents

Both the criminal appeals are preferred under Sec.374(2) of The Code of Criminal Procedure against the judgment of the Special Judge (NDPS Act), Chennai made in C.C.No.111 of 1994 and dated 30.3.1999.

!For Appellant in
CA 392/99 and
Respondents in
CA 802/99 : Mr.S.Hameed Ismail

^For Respondent in
CA 392/99 and
Appellant in
CA 802/99 : Mr.P.N.Prakash

Special Public Prosecutor
(NDPS)

:COMMON JUDGMENT

This judgment shall govern both these appeals.
2. The first appeal is brought forth by A-3 who was found guilty under Sec.8 read with 17 of the N.D.P.S. Act and sentenced to undergo R.I. for 10 years and to pay a fine of Rs.1,00,000/- in default to undergo 2 years R.I., while the later appeal is brought forth by the State aggrieved over the judgment of acquittal made by the trial Court in respect of A-1, A-2 and A-4.
3. The short facts necessary for the disposal of both these appeals can be stated as follows:
(a) The accused 1 to 4 as a gang was operating between India and Sri Lanka across the straits. Pursuant to the intelligence gathered, A-3 was intercepted by P.W.1 Tmt.R.Vijayalakshmi, an Intelligence Officer and P.W.12 Chandrasekaran, Superintendent on 16.10.1993 at 11.00 P.M. in Kolathur, Chennai. A-3 was travelling in an auto rickshaw bearing Registration No,.TSH 1168 driven by P.W.5 Shenbagasekaran. P. Ws.1 and 12 seized 970 grams of heroin in the presence of P.W.5 and one Nawab John. Two samples under M.Os.2 and 3 were drawn from the seized heroin, and the entire seizure has been recorded in Ex.P1 mahazar. The rest of the contraband is marked as M.O.1. The said P.W.12 is an Officer of gazetted rank, and thus, he was empowered under Sec.41(2) of NDPS Act to conduct the search and th e seizure or authorise the subordinates to do the same. After seizure of the heroin from A-3, his statement under Sec.67 of the NDPS Act was recorded by P.W.1, and the same is marked as Ex.P2. A-4 was intercepted on 17.10.93 near Central Railway Station at 8.45 A.M. by P.W.6 Gopalan, when he just arrived from Delhi by G.T. Express. The belongings of A-4 was searched in the presence of P.W.8 Sathya, and incriminating documents like air tickets, train ticket, telephone numbers, visiting cards and cash of Rs.29,000/- were seized under Ex.P41 mahazar. After the search and the seizure, the statement of A-4 under Sec.67 of the Act was recorded in the presence of P.W.6 at the NCB Office and marked as Ex.P42.
(b) On 17.10.93 at 11.30 A.M., Room No.206, Visweshwara Bhavan at Millers Road, Madras 10, which was in the occupation of A-2 Asokan was searched by P.W.4 Ashokraj in the presence of P.W.9 Gopal and one Saravanan. The incriminating documents like spiral note book containing certain details, a letter head of Oxford Furniture, etc., were recovered in the room. After the search and seizure, the statement of A-2 was recorded by P.W.4 under Ex.P38. On 17.10.1993, the residence of A-1 Rajasingh at Aziz Nagar, Kodambakkam, Madras 24 was searched at 1.15 P.M. by P.W.2 and P.W.12 in the presence of the independent witnesses P.W.3 Muthu and one Mohan. During the search, incriminating documents under Exs.P26 to P31 were recovered under Ex.P21 mahazar. Thereafter, A-1's statement under Sec.67 of the NDPS Act was recorded by P.W.2, and the same is marked as Ex.P22. In the course of the enquiry under Sec.67 of the Act, A-3 revealed that he has kept 25 kilos of opium concealed at a place in Mariyur, Ramnad District, and that he would show the place where he had kept the contraband hidden if he is taken to that place. After recording the said statement, A-1 was arrested by P.W.2 by serving the arrest memo marked as Ex.P23. A-2 was arrested by P.W.4 vide

arrest memo under Ex.P39. A-3 was arrested by P.W.1 vide arrest memo under Ex.P3, and A-4 was arrested by P.W.6 under Ex.P43 arrest memo. After their arrest, all the accused were produced before the Chief Judicial Magistrate, Egmore, Madras vide Ex.P6 remand application. The seized heroin under M.O.1 with the two samples under M.Os.2 and 3, cash of Rs.29,000/- and all other documents that were seized from various places as stated above were submitted to the remanding Magistrate along with remand application under Ex.P6 .

(c) Since A-3 disclosed that he had concealed 25 kilos of opium at a place in Mariyur, P.W.1 requested the remanding Magistrate to give A-3 in her custody. Accordingly departmental custody of A-3 was given on 18.10.93, pursuant to which P.Ws.1 and 12 took A-3 to his native place at Mariyur in Ramnad District. They reached Mariyur and very near his hut 25 kilos of opium concealed by him was recovered by P.Ws.1 and 12 under Ex.P5 mahazar. After seizing the contraband, A-3 was returned to judicial custody and was produced before the remanding Magistrate along with 25 kilos of seized contraband of opium on 21.10.9 3 for further judicial custody. The samples drawn from the said heroin as well as from the opium were sent for chemical analysis. P.W.10 Ameerrasakkhan, the Chemical Examiner by his report under Ex.P56 confirmed the presence of Di-acetyl Morphine in M.O.2. Further P.W.10 in his report under Ex.P57 has confirmed that the 25 samples were opium. As a measure of further investigation, a sum of Rs.40,000/- was taken possession from one Dhanraj, a relative of A-1 by P.Ws.1 and 12 under Ex.P18 on 22.10.93. The said sum of Rs.40,000/- is marked as M.O.87. Following the same, the Manager of the STD Booth from where A-1, A-2 and A-3 used to make telephone calls to Delhi and Sri Lanka was examined under Sec.67 of the Act. He was examined in Court as P. W.14 Srinivasan. P.W.14 identified A-1 to A-3 as persons who used his STD Booth to make national and overseas calls. The telephone calls made from the STD Booth telephone No.4833961 between 1.8.93 and 15.8.93 to certain specified numbers in Madhya Pradesh, Delhi and Sri Lanka were obtained from the Telephone Department vide Ex.P61. Based on the materials collected, a complaint under Sec.36(a)(i)(d) of the N. D.P.S. Act was filed against A-1 to A-4.

4. The trial Court framed the necessary charges of conspiracy against A-1 to A-4 for trafficking in 970 grams of heroin and 25 kilos of opium and also individual charge of possession of heroin and possession of opium against A-3 alone.

5. In order to prove its case, the prosecution has examined 15 witnesses and marked 63 exhibits and 87 material objects. After completion of the evidence of the prosecution, the accused were questioned under Sec.313 of Cr.P.C. as to the incriminating circumstances found in the evidence of the prosecution witnesses, which they flatly denied as false. The defence has examined 2 witnesses and marked 11 documents. Ex.C1 was also marked. On consideration of the rival submissions and scrutiny of the materials, the trial Court found A-1 guilty under Sec.8 read with 17 of the N.D.P.S. Act and sentenced him to undergo the imprisonment as referred to above. The trial Court has found A-1, A-2 and A-4 not guilty of the charges against them. Aggrieved over the conviction and sentence imposed on A-3, the first appeal is brought forth by him, while aggrieved over the acquittal of A-1, A-2 and A-4, the State has brought forth the next appeal.

6. Arguing for the appellant/A-3, the learned Counsel Mr.S.Hameed Ismail interalia raised the following submissions for consideration by this

Court:
The trial Court has acquitted A-1, A-2 and A-4 of all the charges levelled against them, since the evidence was not only lacking but unbelievable. It is pertinent to point out that the trial Court has also acquitted the appellant/A-3 in respect of the accusation that he was in illegal possession of 970 grams of heroin, but has found him guilty in respect of his illegal possession of 25 kilos of opium at Mariyur. The prosecution has not chosen to examine the mahazar witnesses as found under Ex.P5. The prosecution has not tendered any explanation also in that regard, and hence, the evidence that was available in the hands of the prosecution was P.Ws.1 and 12 only. Under such circumstances, the evidence of D.W.2 was more credible and trustworthy. In respect of the so-called seizure of opium, the lower Court has failed to give proper appreciation of the evidence of D.W.2. The lower Court has agreed that the defence case that there was gross noncompliance and violation of the mandatory provisions under Sec.41(1) & (2) and Ss 50 and 57 of the N.D.P.S. Act. In view of the same, the lower Court has acquitted the appellant/A-3 in respect of the possession of 970 grams of heroin. There are lot of major contradictions present in the evidence of P.Ws.1 and 12. In view of those contradictions, their testimonies should have been rejected by the lower Court. The prosecution has filed a memo that the mahazar witnesses in connection to the seizure of 25 kilos of opium were not at all traceable, and the same should have been rejected by the lower Court as a false statement of fact. Since the provisions of the NDPS Act are stringent and the punishment is so graver, the prosecution is expected to exercise care and prove its case beyond reasonable doubt. But, in the instant case, when the prosecution has come forward to state that he was in illegal possession of 25 kilos of opium, it has not taken care to examine the mahazar witnesses, but relied on the evidence of its own officials. Under such circumstances, the a ppellant/A-3 should be acquitted of the charges levelled against him.
7. In answer to the above, the learned Special Public Prosecutor Mr.P.N.Prakash would submit that the appellant/ A-3 was taken to custody by the officials, after he was produced before the concerned Court, and as per the information given him, which was recorded earlier and filed before the Court, A-3 took the officials namely P.Ws.1 and 12 to Mariyur in Ramnad District, and nearby his house, he unearthed 25 kilos of opium and the same was recovered under Ex.P5 mahazar in the presence of two independent witnesses; that the prosecution despite hectic attempt could not trace those witnesses, and hence, they could not be examined; that a memo was filed before the lower Court, which was accepted by the trial Court; that P.Ws.1 and 12 have given cogent evidence in that regard; that the property was also produced immediately after the seizure was made; that under such circumstances, the lower Court was perfectly correct in relying on the evidence and finding the appellant/A-3 guilty, and hence, the judgment of the lower Court in respect of A-3 has got to be sustained.
8. Assailing the judgment of acquittal by the lower Court, the learned Special Public Prosecutor for the State in C.A.No.802/99 raised the following submissions for consideration by this Court:
The trial Court has acquitted A-1, A-2 and A-4 stating that the prosecution has failed to adduce satisfactory evidence regarding conspiracy. It was because of the non-appreciation of the evidence adduced by the prosecution in that regard. The statement of A-3 was recorded under Sec.67 of

the NDPS Act at the earliest, wherein he has referred to A-1, A-2 and A-4, and pursuant to the same, the prosecution documents namely Exs.P25 to P31 from A-1, Exs.P33 to P37 from A-2 and Exs.P45 to P49 from A-4 were seized. They would clearly speak about the association of the accused with each other and would clearly establish the conspiracy in which each and every accused had a role to play. The recovery of those documents effected from A-1, A-2 and A-4 would clearly corroborate the statement of A-3. In a case of conspiracy, what is expected in law is not a corroboration of each and every material particular, but a general corroboration would be suffice. The lower Court has failed to note that there was no satisfactory explanation for retraction. If the statements are voluntary and retracted subsequently, it would indicate the after thought, and those voluntary statements could be relied. From the evidence available, it was very clear that all the accused 1 to 4 have involved in clandestine activities, and hence, there cannot be any distinct and direct evidence. The conspiracy aspect of the case was necessarily an inferential fact fromm the proved facts and circumstances. The lower Court has taken a wrong view that every link in the conspiracy was to be proved. The lower Court has taken into consideration the evidence of P.W.9, a hostile witness and hence should have rejected the interested evidence of D.W.1 as regards A-1. Before coming to the conclusion on the question of conspiracy, the lower Court has not assessed the evidence in its totality. The reasons adduced for acquitting A-1, A-2 and A-4 on the charge of conspiracy are unsound and unsustainable. Hence, the judgment of acquittal of the trial Court has got to be set aside, and the respondents/A-1, A-2 and A-4 should be found guilty of the charge of conspiracy under Sec.29 of the NDPS Act.

9. Strongly opposing all the above contentions of the State, the learned Counsel for the respondents/A-1, A-2 and A-4 would submit that there was no evidence on the side of the prosecution as to the conspiracy; that no circumstance was also brought forth that A-1, A-2 and A-4 have conspired along with A-3; that the lower Court on discussion of the evidence in extenso has come to the correct conclusion that the charge of conspiracy was not at all proved by the prosecution, and thus, the appeal by the State has no merits, and it has got to be dismissed.

10. This Court paid its full attention on the submissions made by the learned Counsel for the accused and the learned Special Public Prosecutor for the State. But, the Court is unable to notice any merit in either of these appeals.

11. The gist of the prosecution case as could be seen above against the appellant/A-3 was that he was intercepted on 16.10.1993 by P.W.1 an Intelligence Officer and P.W.12 Superintendent, both attached to the N.C.B., when he was travelling in an auto driven by P.W.5; that after following the procedural formalities 970 grams of heroin was recovered from him in the presence of P.W.5 and another witness, not examined; that samples were taken; that his statement under Sec.67 of the NDPS Act was recorded; that a case was registered; that he was taken to the concerned Court along with the material objects; that they were all produced before the Court, and A-3 was remanded to judicial custody. Insofar as the seizure of 970 grams of heroin, the samples were put to chemical analysis, and they found to contain a narcotic substance heroin. The Court below believed the evidence adduced by the prosecution that there was a seizure of 970 grams of heroin, as put forth by the prosecution. But, the trial Court found that the mandatory provisions under Ss 42 and 50

have not been complied with strictly, and hence, that would be fatal to the prosecution case, and rejected that part of the prosecution case. It is pertinent to point out that that part of the judgment of the Court below has not been appealed against. But, the prosecution came forward with a further case against the appellant/A-3 that after he was remanded to judicial custody, an application was filed before the concerned Court seeking his custody; and that custody was given; that while he was in the custody of the Department, pursuant to his information given in the statement recorded under Sec.67 of the NDPS Act, he took the officials P.Ws.1 and 12 to Mariyur in Ramnad District and nearby his house, he unearthed 25 kilograms of opium, and the same was seized under Ex.P5 mahazar in the presence of two independent witnesses, and the same was produced before the concerned Court. Now, the lower Court has appraised the evidence adduced by the prosecution and has found him guilty and rightly too.

12. It is true that both the mahazar witnesses have not been examined. A memo was filed by the prosecution before the trial Court stating that the witnesses could not traced, and hence, they could not be produced before the trial Court to be examined. But, it remains to be stated that the evidence of P.W.1, who effected the seizure, has been fully corroborated by the evidence of P.W.12. A seizure memo has also been prepared, a copy of which has also been served on A-3 and has also been filed before the Court. One other circumstance present in the prosecution case is the nature of confession so made by A-3 at the time of the original statement recorded by the officials under Sec.67 of the Act even before he was produced before the concerned Court, and only thereafter, a requisition was made before the concerned Court for the custody of A-3, pursuant to which he has taken the officials to his native place and produced 25 kilograms of opium, and the same has been seized following the procedural formalities. This fact of seizure, pursuant to the statement given by him, which was also produced before the concerned Court at the earliest and the recovery of the same as a consequence thereon along with the evidence adduced through P.Ws.1 and 12 would clearly indicate that it was in his illegal possession. It is pertinent to note that a rebuttable presumption was available to him, but, he has failed to do the same. Hence, it is a case, where the lower Court was perfectly correct in recording a finding that the appellant/A-3 was in illegal possession of 25 kilograms of opium and that he was guilty for the same. The Court is unable to notice any infirmity or illegality on the procedures followed by the officials or rebuttable evidence to hold that A-3 had not the culpable mental state. Therefore, there is nothing to interfere in the conviction of the appellant/A-3 by the trial Court.

13. So far as the appeal by the State is concerned, the specific case of the State was that A-3 was found in illegal possession of 970 grams of heroin, and he has given a statement recorded under Sec.67 of the NDPS Act, wherein he has referred to the other accused namely A-1 , A-2 and A-4, pursuant to which A-4 who came from Delhi by G.T. Express was intercepted on 17.10.1993 and all the incriminating documents were recovered from him, and a statement was recorded under Sec.67 of the Act by P.W.6 and marked as Ex.P42; that likewise on 17.10.93, Room No.206 Visweshwara Bhavan at Millers Road, Madras which was in the occupation of A-2, was searched by P.W.4 in the presence of the witnesses, and incriminating documents like spiral note book containing certain details, a letter head of Oxford Furniture, etc., were

recovered; that after the search and seizure, a statement of A-2 was recorded under Sec.67 of the Act by P.W.4 and marked as Ex.P38; that on the same day, the residence of A-1, according to the prosecution the prime accused, at Aziz Nagar, Kodambakkam, Madras was searched by P.W.2 and P.W.12 in the presence of the witnesses, and incriminating documents namely Exs.P26 to Ex.P31 were recovered under Ex.P21 mahazar, and thereafter, a statement was recorded from A-1. What was contended by the prosecution before the Court below and equally here also is that in the statement made by A-3, recorded under Sec.67 of the NDPS Act, he referred to all the three accused namely A-1, A-2 and A-4, and at the time of search number of documents were recovered from them, which would clearly establish the association of the accused with each other, and they would establish the conspiracy; and that they had a role to play in the crime in question namely the trafficking in 970 grams of heroin, what was originally in the possession of A-3, and further in order to prove the same, the Manager of the telephone booth has been examined as P.W.14, who clearly identified A-1, A-2 and A-3 and has also deposed that they used to book STD calls to different places including Delhi and Sri Lanka during the relevant period namely 1.8.1993 to 15.8.1993, and apart from that, certain documents were recovered from A-4, wherein a letter head of Oxford Furniture of Delhi was found, which would clearly speak to the fact of conspiracy, and hence, not all the particulars have got to be proved, but a corroboration in general would be suffice, and the same has been done in the case on hand. The Court is unable to notice any evidence to connect A-1, A-2 and A-4 to the crime of conspiracy in question. It is not in dispute that no contraband was recovered from any one of these three accused namely A-1, A-2 and A-4. They were also not found in the company of A-3. What was available for the prosecution was the statement recorded from A-3. As rightly pointed out by the learned Special Public Prosecutor, there has been reference to A-1, A-2 and A-4. But, the Court is of the considered view that the same would not be suffice to prove the theory of conspiracy. The prosecution has relied on Exs.P25 to P31 seized from A-1, Exs.P33 to P37 from A-2 and Exs.P45 to 49 from A-4. Through these documents, the manner the association of A-1, A-2 and A-4 along with A-3 or A-1, A-2 and A-4 inter-se is not shown by the prosecution in any way. In no one of these documents, the name of A-3 or anything to connect that 970 grams of heroin, could be found. It is pertinent to point out that the officials have categorically deposed before the trial Court that even after the seizure of those documents, they did not make any further investigation in respect of the details found in those documents. This would clearly indicate that they have thoroughly failed to investigate the same. But, they came out with the case of conspiracy relying on those documents surprisingly. On mere seizure of those documents from A-1, A-2 and A-4 without any corroborative piece of evidence and in the absence of anything to connect those documents with the crime in question, at no stretch of imagination, the Court can hold that the conspiracy theory put forth by the prosecution was proved. Hence, the lower Court was perfectly correct in holding that the case of the prosecution that A-1, A-2 and A-4 hatched up a conspiracy to commit the offence was not proved in any way. In that regard, the Court has to necessarily affirm the judgment of the Court below.

14. In the light of the above reasons, the Court is unable to notice any illegality or infirmity either in the conviction of A-3 or in the acquittal of A-1, A-2 and A-4 made by the lower Court. Coming to the question

of sentence, the lower Court has sentenced the appellant/A-3 to undergo 10 years R.I. and to pay a fine of Rs.1,00,000/- in default to undergo 2 years R.I. under Sec.8 read with 17 of the NDPS Act. In view of the facts and circumstances of the case, the Court is of the view that while affirming the sentence of imprisonment and fine, the default sentence of 2 years R.I. has got to be reduced to 6 months R.I., and the interest of justice would also require the same.

15. In the result, the default sentence of 2 years R.I. imposed by the lower Court on the appellant/A-3 is modified, and the appellant/A-3 shall undergo 6 months R.I. in the event of default of payment of fine amount awarded by the lower Court. In other respects, the judgment of the lower Court is confirmed. With the above modification, both the criminal appeals are dismissed.

Index: Yes
Internet: Yes

To:

1) The Special Judge - NDPS Act, Chennai.
2) The Principal Judge, Chennai.
3) The Superintendent, Central Prison, Vellore.
4) The Special Public Prosecutor-NDPS, Chennai.
5) The D.I.G. of Police, Chennai 4.
6) The Intelligence Officer, Narcotic Control Bureau, South Zone, Chennai.

nsv/

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